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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 253.

MARY ANN O'BRIEN, *Petitioner,*

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, A CORPORATION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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MARY ANN O'BRIEN, *Petitioner,*

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, A CORPORATION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

This is a petition for writ of certiorari to review a decision and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW.

The opinion of the Eighth Circuit Court of Appeals hereinafter filed was reported under 212 F. 2d 383.

JURISDICTION.

The grounds on which jurisdiction of this Court are invoked are that the United States Court of Appeals for the Eighth Circuit, by its opinion has, (1) decided an important State question in a way that conflicts with the applicable law of the State of Missouri, and (2) has sanctioned a departure by the lower Court of the proper, accepted and usual course of judicial proceedings calling for an exercise of this Court's power of supervision.

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered on the 21st day of April, 1954, and entered on the same date.

The order of the United States Court of Appeals for the Eighth Circuit denying Petitioner's application for rehearing was entered on the 6th day of May, 1954.

The statutory provision authorizing this Court to review the judgment and conferring jurisdiction herein is 28 U. S. C. A. 1254.

QUESTION PRESENTED.

The question presented for review:

Can Plaintiff's prima facie case be taken from the jury?

STATEMENT.

Plaintiff, the widow of decedent, a motor car salesman, brought this action to recover for his death under a contract of insurance with Defendant providing for double indemnity benefits in the event of death by accident. Payment of the principal sum in the amount of Ten Thousand

($10,000.00) Dollars had been made, but Defendant refused payment of the accidental death benefit in the amount of Ten Thousand ($10,000.00) Dollars on the ground that decedent's death was not an accident and also contended that the death was the direct result of an assault or commission of a felony by decedent, either of which were excepted risks under the contract of insurance. Suit was instituted in the Circuit Court of Jackson County, Missouri, and removed to the Federal District Court, Western Division, Western District, upon petition of Defendant on the ground of diversity of citizenship of the parties, the amount in controversy exceeding the sum of Three Thousand ($3,000.00) Dollars.

Upon trial, Plaintiff's evidence established the contract providing for the payment of Ten Thousand ($10,000.00) Dollars for accidental death; that decedent was shot and killed in the home of a colored woman to whom he had sold a car on the preceding day and to whom, at her suggestion, he was delivering the title to said vehicle while enroute to his home after leaving his place of employment as usual at the regular time.

Defendant's evidence established that decedent was shot and killed by the woman's alleged husband and at the house where said woman was residing with her two children; that decedent had come to her home upon her suggestion to deliver title to the automobile she had purchased so that she could drive to church on the following day, Sunday. The evidence further disclosed that the woman was shot twice by her alleged husband but she did not die of her wounds; that decedent was clad only in an undershirt after the shooting. On cross-examination there were many discrepancies regarding the marital status of assailant and the woman car purchaser; also as to the time of the shooting; and as to whether the assailant had gained

entry by forcing and breaking the outer door. Her family physician testified he had considered, several years prior thereto, having the woman committed to an institution because of her mental condition.

The woman testified only by deposition, but the assailant testified in person and it was contended by them that decedent had made improper advances toward the woman and had sought to force his intentions upon her and was attempting to take advantage of her at the time the assailant, living, and then at his parents' home some three hundred (300) feet away, heard her screams and came to the home armed with his father's revolver where he shot decedent and his alleged wife after breaking an inner door.

On rebuttal, there was medical evidence to show the woman car purchaser was a highly emotional person; that decedent's vision without glasses was approximately Twenty (20%) per cent retained vision, but that with glasses fitted about a year before the occurrence, vision was normal; the police inventory of his personal effects disclosed his glasses, sport shirt, leather secretary, trousers and shoes were missing and Thirteen Dollars and Forty-five Cents ($13.45) recovered, whereas the widow testified that all of these things were in his possession that day as well as regularly used and carried, and that morning he had over Two Hundred ($200.00) Dollars in the leather secretary.

At the close of all the evidence, the trial Court sustained Defendant's motion for directed verdict.

BRIEF AND ARGUMENT.

It is the belief and contention of Plaintiff, petitioner herein, that the proof of death by violence at the hands of

another constitutes and establishes *prima facie* "death by accident" under the applicable Missouri law.

A. Having made a *prima facie* case of accidental death, she cannot be denied a jury determination of whether her husband's death was accidental; or

B. Defendant's affirmative defense: did he in fact assault the woman as alleged or commit a felony as claimed by Defendant, either of which would be an excepted risk.

A.

The Missouri law provides that death at the hands of another though intended by the assailant is nonetheless accidental insofar as decedent is concerned. *Eicks* v. *Fidelity and Casualty Company,* (Mo. Sup.) 300 Mo. 279, 253 S. W. 1029; *Berryman* v. *Southern Surety Company,* (Mo. Sup.) 285 Mo. 279, 227 S. W. 96; *Lovelace* v. *Travelers Association,* (Mo. Sup.) 126 Mo. 104, 28 S. W. 877, and *Utterback* v. *New York Life Insurance Company,* (St. L. C. A.) 191 S. W. 2d 421.

B.

Having established a *prima facie* case of accidental death, Plaintiff's case could not be taken from the jury under the applicable Missouri law. *Wendorff* v. *Missouri State Life Insurance Company,* (Mo. Sup.) 318 Mo. 363, 1 S. W. 2d 99; *Smith, Admx.,* v. *Metropolitan Life Insurance Company,* (K. C. C. A.) 107 S. W. 2d 808.

A.

Under all of Plaintiff's evidence, her husband's death resulted from a felonious assault without provocation, without warning or reason to anticipate. As a sales representative in the course of his employment, he was rightfully on the premises, but because his lips are now sealed, many

questions relating to events that transpired after his entry thereon are necessarily unanswered. Still the fact remains: decedent having met death at the hands of another, it is accidental unless Defendant sustains its burden of proving misconduct. The lower Courts in effect sustain a charge amounting to no more than bare accusation, give to it the weight of evidence and require Plaintiff to prove decedent innocent. This is not the law of the State of Missouri.

Defendant's contention that decedent was, himself, guilty of provoking an assault and therefore, had reason to anticipate his ultimate death as a consequence of his own acts, is supported by oral testimony of the facts alleged introduced by Defendant, all of which is denied by Plaintiff. Hence, the question of accident or no accident is peculiarly within the province of the jury in that it requires findings of fact, the weighing of evidence and a determination of the credibility of witnesses. The plea of justification by Defendant's witness, the assailant, under our system of jurisprudence, must withstand rigorous scrutiny and consideration of a jury and failing so to do, be necessarily and properly rejected. To permit the action of the two lower Courts to stand, in effect, sanctions the misdeed of the assassin, accepts as a matter of law his testimony and plea of innocence and charge of guilt and giving it the weight of evidence, requires Plaintiff to prove decedent innocent. This is not the law of the State of Missouri.

If permitted, its effect would be license to the guilty to accuse the innocent without fear or concern, for any such would be thereby relieved of the burden of persuading a jury as to the believability, the reasonableness, the likelihood, the truth of their charges and accusations. Decedent most certainly, on the basis of all the evidence, an industrious, happily married, home loving, young man; having

been thrown into association and contact with this woman car buyer, was a victim of the violent and tempestuous relations and feelings existing between she and her former spouse and was shot and killed when it reached explosive force.

Only by a jury consideration and by their findings of fact can a fair determination be had as to the respective rights and liabilities of the parties, and this right, guaranteed under the laws of the State of Missouri, has been denied by the improper action and ruling of the United States Court of Appeals for the Eighth Circuit.

B.

Under the Missouri law as enunciated in *Wendorff* v. *Missouri State Life Insurance Company,* (Mo. Sup.) 318 Mo. 363, 1 S. W. 2d 99, and so aptly applied in *Smith, Admx.,* v. *Metropolitan Life Insurance Company,* (K. C. C. A.) (Mo. App.) 107 S. W. 2d 808, *once a Plaintiff has established a prima facie case, she cannot be denied submission to the jury* and this rule has only two exceptions: (1) when the proof is documentary, which certainly does not apply here, and (2) when the Defendant relies upon Plaintiff's own evidential showing, which again has no application here, *Wendorff* v. *Missouri State Life Insurance Company,* l. c. 101. Therefore, the positive substantial proof of the death of Plaintiff's husband by wanton killing was strengthened and corroborated by Defendant's proof rather than weakened and to deny to her the right of jury determination contravenes the law of Missouri as stated in *Smith, Admx.,* v. *Metropolitan Life Insurance Company, supra,* l. c. 811 (8), "There are some cases holding the trial Court may peremptorily instruct. But in such cases *the facts either are not in dispute or the cases in some other way fall within an exception* to the general rule (emphasis supplied).

Wendorff v. *Missouri State Life Insurance Company, supra* (numerous authorities cited)."

CONCLUSION.

The facts in this case are not only in dispute, but it is inconceivable that testimony of the two witnesses, the only other actors in the tragedy, with all of its discrepancies and inconsistencies, could be found acceptable as a matter of law. To say as a matter of law that decedent was guilty because two parties with strong personal interest and reason for so doing, make such charge, in effect requires that a party prove his innocence.

The Missouri law has established Plaintiff's right of trial by jury and the action of the District Court and the United States Court of Appeals for the Eighth Circuit in refusing to follow that law demands the issuance of a Writ of Certiorari and review of the entire case.

Wherefore, petitioner prays the Court issue a Writ of Certiorari to further proceed as provided by law.

Respectfully submitted,

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OPINION

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 14,954

MARY ANN O'BRIEN, *Appellant,*

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a Corporation, *Appellee*

Appeal from the United States District Court for the Western District of Missouri

[April 21, 1954]

Thomas E. Hudson (David T. Cavanaugh and Hudson, Whitcraft & Cavanaugh, were with him on the brief), for Appellant.

Henry I. Eager (Henry G. Eager, Blackmar, Newkirk, Eager, Swanson & Midgley; Leo D. Fitzgerald and Joseph L. Zehnder, of Counsel, were with him on the brief), for Appellee.

Before Gardner, Chief Judge, Johnsen and Collet, Circuit Judges

COLLET, *Circuit Judge:*

This is an action to recover double indemnity insurance for the alleged accidental death of plaintiff's husband. From a directed verdict for the defendant insurance company at the close of all the evidence, plaintiff appeals. The sole question for review is whether plaintiff established a prima facie case warranting its submission to the jury. It is conceded that the law of Missouri is controlling.

The policy provided for the payment of $10,000.00 upon the death of the insured. That has been paid and is not in dispute. In addition, the policy provided for the payment of an additional $10,000.00 in the event of accidental death,

with certain qualifications. Whether those qualifications, only one of which is now involved, constituted an integral part of the definition of coverage for accidental death, or were exceptions to coverage, is given considerable importance by the parties. The definition of coverage and the qualifications appear in the policy in the following language:

"The Society agrees, subject to the provisions hereinafter stated, to increase the amount payable under said policy by a sum equal to the face amount thereof upon receipt of due proof, as herein required, that

"(1) the death of the Insured resulted from bodily injuries caused directly and independently of all other causes by external, violent and purely accidental means,

"(2) such death occurred within 90 days after the date of such injuries, and while said policy and this additional indemnity provision were in force and no premium thereunder in default, and before the anniversary of the Register date of said policy upon which the Insured's age at nearest birthday is 65 years,

"(3) such death was not the result of or caused by (a) self-destruction sane or insane; or (b) any drug, poison, gas or fumes, voluntarily or involuntarily, accidentally or otherwise, taken, administered, absorbed or inhaled; or (c) war, whether declared or undeclared, or service in any military, naval or air forces of any country at war, whether declared or undeclared; or (d) committing or attempting to commit an assault or felony; or (e) travel or flight in, or descent from, any aircraft of which the Insured shall be a pilot, officer or member of the crew or in which he shall be participating in aeronautic or aviation training or in training as a member of the military, naval or air forces of any country, and

"(4) disease or illness of any kind, physical or mental infirmity, or medical or surgical treatment therefor, did not directly or indirectly cause or contribute to such death."

The insured was shot and instantly killed by Robert Jackson on the evening of October 27, 1951, at the home of Virginia Jackson, his wife, from whom he was temporarily separated. There were no witnesses to the shooting and what transpired immediately theretofore except the Jacksons and the deceased. The Jacksons' testimony constitutes substantial but not clear, positive and unequivocal evidence that the insured was at the time of his death committing an assault or a felony, or both, and that that was the cause and reason for the shooting. The husband, Robert Jackson, testified that he heard an outcry from his father's home some 300 feet away, saw something flit by a window, and got his father's revolver, went to the house, found the insured in bed with his wife, and opened fire. Several shots were fired, one of them taking effect in the hips of Virginia Jackson. She substantiated his testimony and testified that she was forced into the bedroom and onto the bed but does not remember what happened after that until the first shot was fired. There was some uncertainty on the part of both Jacksons concerning the number of times they had been married to each other and divorced, but both were sure that at the time in question they were married. There is no conflict in the evidence on that point.

The plaintiff offered in evidence the policy, made proof of death by gunshot wounds inflicted by another, and rested. A motion for a directed verdict was made and denied. The defendant then offered the evidence heretofore referred to, which is uncontradicted and which, as heretofore stated, showed that death occurred while the insured was committing an assault or felony or both. Plaintiff then offered some evidence tending to create the inference that robbery might have been the motive for the shooting. Whether that evidence, together with the other evidence on plaintiff's behalf, was sufficient to make out a submissible case in plaintiff's favor will be alluded to later. At the close of all of the evidence the trial court sustained defendant's motion for a directed verdict.

As stated, this case is to be determined upon principles of law consonant with the law of Missouri. Before considering the legal principles which, in view of the facts,

must govern the propriety or impropriety of the directed verdict, it is necessary to keep in mind those double indemnity provisions of the policy, heretofore quoted, which give rise to the instant litigation. It is plaintiff's contention that her burden of establishing a submissible, prima facie case of accidental death was satisfied upon the mere showing of the insurance agreement and the violent death of the insured at the hands of another. Plaintiff insists that defendant had the burden of proving its "affirmative defense" that the insured was engaged in the commission of a felony at the time of his death. Thus it is argued, not without logic, that plaintiff's prima facie case and defendant's affirmative defense should have been submitted to the trier of the facts.

In a sense, the felony clause on which defendant relies constitutes, as in the case of suicide, a risk excepted from coverage. It is an "exception" in that the insurance company issuing the policy must be the party on whom the burden lies to bring forth the applicability of the "exception" so as to justify a denial of accidental death benefits. It is, however, the broad and unqualified assertion of this very principle which has caused misunderstanding among members of the bar and, on occasion, considerable confusion in the reported cases. Consequently, we review the controlling state authorities on the subject, in order to dispel the confusion and resolve the apparent conflict.

It is fundamental that in cases involving double indemnity benefits the burden of proving accidental death rests firmly upon the plaintiff seeking recovery. *Laessig* v. *Travellers' Protective Assn. of America* (Mo. S. Ct. 1902) 69 S.W. 469; *Griffith* v. *Continental Casualty Co.* (Mo. S. Ct. 1921) 235 S. W. 83; *Aufrichtig* v. *Columbian National Life Ins. Co.* (Mo. S. Ct. 1923) 249 S. W. 912; *Tillotson* v. *Travelers Ins. Company* (Mo. S. Ct. 1924) 263 S. W. 819; *Landau* v. *Pacific Mutual Life Ins. Co.* (Mo. S. Ct. 1924) 267 S. W. 370; *Edwards* v. *Business Men's Assur. Co.* (Mo. S. Ct. 1942) 168 S. W. 2d 82.

Just what are the evidentiary demands at trial necessary to meet this initial and never shifting burden is obscured considerably by a broad procedural utilization of legal presumptions. To illustrate more graphically, it is said that

the burden of proving accidental death rests unswervingly upon the plaintiff, yet, due to recognized human propensities, we will presume that there is so strong a love of life in the human breast that death by one's own hand or by invitation is lacking, in the absence of evidence to the contrary. *Sellars* v. *John Hancock Mutual Life Ins. Co.* (Mo. App. 1941) 149 S. W. 2d 404. In this way a prima facie case of accidental death arises from the presumption against non-accidental death, thereby satisfying plaintiff's burden of proof. Some courts have said that death by accident is not presumed, but merely follows, so to speak, from the presumption *against* suicide or death by invitation. *Perringer* v. *Metropolitan Life Ins. Co.* (Mo. App. 1951) 244 S. W. 2d 607. But whether it is said an unexplained violent death will be presumed accidental, or, instead, a showing of violent death merely raises a presumption *against* suicide or invited injury, we think the difference is one without legal distinction. Suffice it to say, an unexplained death by violence is alone sufficient to make out a prima facie case of "accidental death", whether the presumption utilized is one in *favor* of death by accident or *against* death by suicide. *Sellars* v. *John Hancock Mutual Life Ins. Co., supra;* cf. *Perringer* v. *Metropolitan Life Ins. Co., supra.* As stated in the *Sellars* case, l. c. 405:

> "* * * where no more is shown than the fact of the insured's violent death without the benefit of any of the explanatory circumstances, then such fact, considered in the light of the presumption of love of life which obtains in the case of the normal individual, is so repugnant to the idea of death by intention or invitation as to afford the presumption that death was by accident or accidental means, and thereby satisfy the plaintiff's initial burden of proof upon such issue."

In effect, plaintiff argues that once this "prima facie" case is established, the burden thereafter rests with defendant to prove its affirmative defense on the excepted risk which, whatever the testimony, creates a question of fact submissible to the jury. In so arguing, plaintiff ignores the legal import of the procedural presumption utilized

which, unlike the substantive presumption in a res ipso loquitur case, is not indestructably immune from the effects of refutatory testimony. The presumption of accidental death, while accomplishing the function of evidence in so far as plaintiff's initial burden of going forward is concerned, nevertheless is not evidence of the fact presumed and is merely a rule of procedure or "rebuttable legal presumption." It casts upon defendant the burden of going forward with substantial evidence to the contrary which, if adduced, destroys the procedural presumption on which plaintiff had relied as an evidentiary substitute. As so strikingly quoted by Justice Lamm of the Missouri Supreme Court in *Mackowik* v. *Kansas City, St. J. & C. B. R. Co.* (Mo. S. Ct. 1906), 94 S. W. 256, "Presumptions may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts." The significance of the procedural presumption relates then only to the burden of going forward with testimony, not to the burden of proof. Though the burden of going forward may frequently shift during the course of a trial, the burden of proof remains upon the plaintiff to establish his substantive case.

Where a plaintiff's "prima facie" case vitally depends upon a rebuttable presumption, which is destroyed, then, too, must the "prima facie" case collapse with the presumption, thereby placing upon plaintiff the burden of going forward with evidence sufficient to avoid a directed verdict. Once the presumption is destroyed it is no longer a question of plaintiff's prima facie case versus defendant's affirmative defense, but rather has plaintiff made out a continuing prima facie case at all. Where a rebuttable procedural presumption has been utilized, as in the instant case, at most plaintiff makes out but a "rebuttable" prima facie case which is procedurally but not substantively significant.

With this in mind, we can more easily understand plaintiff's contention that the burden is upon defendant to show facts negating accidental death heretofore presumed. The pitfall lies, however, in confusing this burden, which is one of going *forward* procedurally, with the underlying substantive burden of *proof* which lies constantly with the

plaintiff throughout the course of trial. In a limited sense, the insured's commission of a felony or even suicide is always a risk excepted from accident coverage, in that it is incumbent upon defendant initially to bring the issue forth. But the burden is one dictated by the presumption against death from misconduct which, when removed by substantial testimony, shifts the burden of going forward back to plaintiff to establish by evidence what had formerly been presumed. This is entirely consistent with the underlying burden of proof cast upon plaintiff to establish recoverable accidental death within the meaning of the policy.

In her brief appellant cites numerous cases holding that the burden of proving the death of the insured resulted from his committing a felony is an affirmative defense resting with defendant. One of the more recent cases so holding is *Terry* v. *Metropolitan Life Ins. Co.* (Mo. App. 1947) 206 S. W. 2d 724. Again we caution, such expression must not be lifted out of context. In *Edwards* v. *Business Men's Assur. Co., supra,* the Supreme Court of Missouri carefully considered numerous decisions on the subject, including *Reynolds* v. *Maryland Casualty Co.,* 201 S. W. 1128, wherein it had been held, l. c. 1131:

> "No legal proposition is more firmly established than that where the act which caused death may be either accidental or suicidal the burden is upon the insurer to establish the fact of suicide by a preponderance of the evidence, for the presumption arising from the love of life, which is created for its preservation, is like every natural law, always within the contemplation of the court."

Also cited in the *Edwards* opinion were *Kahn* v. *Metropolitan Casualty Ins. Co.,* 240 S. W. 793, and *Andrus* v. *Business Men's Accident Assn.,* 223 S. W. 70, wherein the court had held, l. c. 77:

> "The burden was on the defendant to *prove* that death under such circumstances was intentional, and not accidental; that is, the burden would be upon the defendant in a case of suicide, to prove that the insured was sane, and committed the act which took his life

with the intention of committing suicide." (Emphasis supplied.)

Though admitting that the burden was upon the defendant to show that death resulted from circumstances constituting an admitted "excepted risk in the policy," the Missouri Supreme Court concluded in the *Edwards* case, speaking through Commissioner Dalton, l. c. 91:

> "The statement, supra, from the *Reynolds* case was construed in the *Brunswick* case, *supra*, 213 S. W. 45, 50, 51 to mean the *burden of going forward with the evidence.* The statement, supra, from the *Kahn* case also refers to the *burden of going forward with the evidence.* * * * If the statement, supra, from the *Andrus* case was not intended to mean *burden of going forward with the evidence,* it has been overruled by the *Griffith* [*Griffith* v. *Continental Casualty Co.*, 253 S. W. 1054] and other cases, supra." (Italics supplied.)

Though most of the cases on the question of presumption involve the factual element of suicide, we are convinced that a "death while in the commission of a felony" clause involves identical considerations. In either event, such occurrences are risks which the insurer "excepts" from coverage and, in that sense, the burden is always upon the insurer to come forward with evidence to rebut the procedural presumption of accidental death. But the burden of *proving* accidental death remains upon plaintiff. With the presumption "disappearing in the sunshine of actual facts", plaintiff must then come forward and, pursuant to his ever-present burden of proof, show that death was accidental by proving the insured was *not* engaging in the commission of a felony. In effect, this means that the insured's misconduct is an "affirmative defense" (although the term is misleading) for the purpose of going forward with evidence, but once that "defense" is raised by defendant going forward with evidence, it is then incumbent upon plaintiff to prove by evidence that the death comes within the meaning of "accident" as used in a policy specifically excluding death from suicide or felonious conduct. *Sellars* v. *John*

Hancock Mut. Life Ins. Co., supra; cf. *Perringer* v. *Metropolitan Life Ins. Co., supra.*

In the instant case appellee proffered the direct testimony of Robert and Virginia Jackson relating the manner of and circumstances surrounding the death of the insured. In view of the authorities cited herein, we are convinced that such testimony amply destroyed any presumption of "accidental death" theretofore arising from plaintiff's bare showing of death by violence. The only question remaining is whether the state of the evidence, when viewed in light of plaintiff's underlying burden of proof and absent presumptions, justified a directed verdict. The test to be used has been variously stated. In the *Sellars* case, the court held, l. c. 406:

> "When contrary facts appear, the presumption [of accidental death] disappears; * * * if the plaintiff, in rebuttal, adduces countervailing evidence supporting the conclusion that death resulted from a cause within the coverage of the policy, then the ultimate question is one of fact to be determined by the jury as in the case of any other factual issue."

By the foregoing it is not meant that in an action of this kind *any* rebuttal testimony, however feeble, will suffice to avoid a directed verdict on behalf of the defending insurance company. The "scintilla of evidence" doctrine is no longer the law of Missouri. *Hardwick* v. *Kansas City Gas Co.* (Mo. S. Ct. 1944) 180 S. W. 2d 670. To hold otherwise would be to ignore a plaintiff's burden to establish his case, no longer aided by presumption. Unless the plaintiff produces some substantial evidence negativing the excepted misconduct and thereby brings the death within the coverage of the policy, a directed verdict will be proper. *Ray* v. *Mutual Life Ins. Co. of New York* (Mo. App. 1949) 218 S. W. 2d 986.

In the instant case the only positive evidence proffered was that at the time of his death the insured was committing an assault or a felony. It is only by inference and innuendo that plaintiff suggests that the insured may have been the victim of robbery and foul play. Although plain-

tiff testified that the insured had some $200 on his person the morning of the fatal day, it would be patently improper to assume that the absence of this money from his personal effects proves thievery claimed his life. To do so we would have to infer that not only did O'Brien have this money with him when he called at the Jackson residence many hours later, but we would have to infer further that theft of this purportedly missing money brought about this tragedy. It requires the citation of no authority that such an inference upon an inference is entitled to no evidentiary consideration. The fact, as testified to by plaintiff, that the insured's trousers were missing is of no substantial evidentiary significance in furthering plaintiff's burden of proving accidental death.

Viewing the circumstances surrounding the insured's death most favorably to plaintiff's hypothesis, we have at most inferences arising which are as consistent with a theory of death while in the commission of a felony as with death by accident. Though plaintiff's initial burden of going forward with the evidence was obviated by a procedural presumption of accidental death, this presumption was destroyed by the positive, substantial testimony of the two Jacksons, thereby casting upon plaintiff the burden, ab initio, of going forward with evidence sufficient to sustain her unshifting and underlying burden of proof on the issue. With this in mind, plaintiff offers only the violent death of the insured from gunshot wounds received at the Jackson residence, and the absence of money, eyeglasses, and certain items of clothing from the personal effects of the insured. Can it be reasonably said that such facts, assuming them to be true, even approach to support plaintiff's burden of proof that the insured was not in the commission of an assault or felony? We think not. The inferences to be gleaned from such evidence are as consistent with defendant's theory of death (which is supported by positive testimony) as they are with plaintiff's. As this court said in *New York Life Ins. Co.* v. *King*, 93 F. 2d 347, 353:

> "* * * evidence which is equally consistent with two hypotheses, under one of which a defendant is

liable, and under the other of which it is not liable, supports neither hypothesis."

Cf., *Christianson* v. *Metropolitan Life Ins. Co.* (Mo. App. 1937), 102 S. W. 2d 682; *Stafford* v. *New York Life Ins. Co.* (Mo. App. 1952) 248 S. W. 2d 76. Consequently, we are convinced the trial court below properly directed a verdict for the defendant.

In view of the foregoing considerations and their decisive effect upon the propriety of the trial court's action, it is unnecessary to consider other grounds advanced by defendant in support of the judgment.

Judgment affirmed.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, SEPTEMBER TERM, 1953

Wednesday, April 21, 1954.

No. 14954

MARY ANN O'BRIEN, *Appellant*,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

Appeal from the United States District Court for the Western District of Missouri

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

April 21, 1954.

ORDER DENYING PETITION OF APPELLANT FOR REHEARING

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, SEPTEMBER TERM, 1953

Thursday, May 6, 1954

No. 14954

MARY ANN O'BRIEN, *Appellant,*

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a Corporation

Appeal from the United States District Court for the Western District of Missouri

Petition for rehearing filed by appellant in this cause having been considered by this Court, it is now here ordered that the same be, and it is hereby, denied.

May 6, 1954.

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RULE

Supreme Court Rule 19 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 253.

MARY ANN O'BRIEN, *Petitioner,*

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, A CORPORATION, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

(References to the record filed by petitioner in the Court of Appeals are prefixed "R"; those to the supplemental record there filed by Respondent as "S. R."; and those to the slip opinion of the Court of Appeals as "Opn.")

Petitioner's statement is devoid of record references and does not set forth accurately the evidence on which the courts below acted. We will, therefore, restate the case ourselves.

The material provisions of the policy here in suit are as follows (S. R. 1):

> "The Society agrees, subject to the provisions hereinafter stated, to increase the amount payable under said policy by a sum equal to the face amount thereof upon receipt of due proof, as herein required, that
>
> "(1) the death of the Insured resulted from bodily injuries caused directly and independently of all other causes by external, violent and purely accidental means,
>
> * * *
>
> "(3) such death was not the result of or caused by * * * (d) committing or attempting to commit an assault or felony; * * *"

Petitioner in her case in chief proved that the insured, a white man, met his death as the result of a gunshot wound (R. 9-13). The Court of Appeals correctly held that, under the law of Missouri, this showing created a presumption of law or procedural presumption that the death was accidental. The presumption is not evidence, however, and it disappears when evidence to the contrary is introduced.

Respondent produced the only eye-witnesses to the death. Virginia Jackson, a Negro woman, testified that the insured came to the home of herself and her husband, purportedly on a business transaction, while she was there alone. Instead of transacting his purported business, he immediately commenced to make suggestive remarks, and then improper advances. She told him that her children were due home at any moment and that *"my husband don't like to have strangers here"* (R. 28) and otherwise tried to persuade him to leave. When she resisted his actions he struck her repeatedly, knocking her to the floor at least

twice and stunning her, and forced or "knocked" her into her child's bedroom, throwing her on the bed (R. 27-8, S. R. 6-8).

Robert W. Jackson, her husband, meanwhile had just come back to the home of his parents two to three hundred feet away (R. 17, 19). (He and his wife were temporarily living partially apart, because of a "childish spat," but visited each other almost every day, went out together, and expected to go back together shortly (R. 19, 26; S. R. 2-3). There is no evidence of "violent and tempestuous relations" between the Jacksons.) His attention was directed to their home by screams and by the violent barking of the dog, and he armed himself with a revolver and went there. Through the window-shades he saw two figures running about. He entered the house, breaking through a locked door, and opened the bedroom door, where he saw a white man in bed on top of his wife (S. R. 3). The door then slammed shut, and when he again opened it the insured (the white figure) was up and was reaching down as though to pick up something. Jackson then "took to shooting" rapidly and in the same instant the insured pulled Mrs. Jackson in front of him (R. 19-20; S. R. 4-5). She was wounded in the hips, and the insured was killed. The latter was clothed only in an undershirt (R. 20, 37; S. R. 4, 14). The Court of Appeals held that this evidence was substantial and uncontradicted (Opn. 3, 4).

The testimony of various nurses and others from St. Margaret's Hospital (where Virginia Jackson was immediately taken) collectively was (from independent recollection) that Virginia Jackson (at or soon after her entry in the hospital) complained of severe headaches, that she had "numerous bruises" more or less all over her body, a black eye, a mark or bruise on the opposite cheek,

and an abrasion like a scrape or floorburn on her arm (S. R. 10-11-12); her hair was matted and there was blood in it (S. R. 11); and she could not eat without medication, because of the headaches. She was light in color and the bruises and marks were readily discernable (S. R. 10, 11). None of this testimony was contradicted or impeached.

There is no justification for the reference to Virginia Jackson as the "alleged wife," or "former wife," of Robert Jackson. Their evidence showed without contradiction that they were husband and wife at the time of the shooting, although they were not sure whether they had been remarried following divorce once, or more than once (R. 20, 34; S. R. 8-9, Opn. 4).

The assertion (Petn., p. 3) that the insured had come to the Jackson home *at Mrs. Jackson's suggestion* is not an accurate rendition of the record. The only evidence is that the insured made the suggestion over the phone that he come to deliver an automobile title, that she objected, that he still insisted on coming and she finally acquiesced (S. R. 6). In fact, when he came he did not even bring the car title which was the pretext of his visit (R. 27).

The assertion in the statement (Petn., p. 3) that "the woman was shot twice by her alleged husband" is out of context and flagrantly misleading. The only testimony in the record is that of Robert Jackson that he did not fire until the insured reached down, and that at that moment the insured pulled Virginia Jackson in front of him (R. 19; S. R. 4).

The supposed discrepancy as to the time of the shooting apparently refers to the inability of witnesses to place the exact hour with reference to the clock, but all testimony indicates that the event took place in the early evening, after dark (S. R. 5, 8; R. 8, 19, 37). All the evidence

shows that Robert Jackson gained entry by forcing a door (R. 19, 37)—which door, front or back, seems of no significance. Petitioner's testimony as to the articles in the insured's possession was based on what he had early in the morning when she last saw him (R. 40). There is no evidence as to what he had in his possession when he went to the Jackson home. Articles of value, including a watch and a ring, and some cash, were found and inventoried (R. 37-38). In fact, petitioner's rebuttal evidence was well summarized by the Court of Appeals when it said (Opn. 11): "It is only by inference and innuendo that plaintiff suggests that the insured may have been the victim of robbery and foul play * * *. It requires the citation of no authority that such an inference upon an inference is entitled to no evidentiary consideration."

The District Court directed a verdict for Respondent on the ground that the uncontradicted testimony showed that the death resulted from the insured's culpable misconduct rather than by accidental means (S. R. 16); and specifically, as expressed by the District Court:

> "And, being culpable, then the ruling is that where one puts himself in a position where he is inviting the thing that occurs, then that makes him blameable, and that which occurred is something which he might reasonably have anticipated."

The Court of Appeals unanimously affirmed, stating that the presumption of accidental death was overcome by the evidence showing misconduct, and that there was no substantial evidence of death from accidental means.

We agree with petitioner and with the Court of Appeals that this case is controlled by Missouri law.

ARGUMENT.

POINT I.

Under the Law of Missouri, a Prima Facie Case Made Out with the Aid of a Presumption of Law May Be Taken from the Jury If the Presumption Is Rebutted by Substantial Evidence and There Is No Evidence to the Contrary.

The proposition asserted by petitioner under Caption "B" on page 5 of the petition, is not a correct statement of the law of Missouri.

Missouri follows the "Thayer view"[1] as to the presumptions of law, or "procedural presumptions," as follows: a presumption is not evidence, but merely takes the place of evidence until evidence of the actual facts is introduced. The presumption, when countered by evidence, disappears for all purposes and thereafter the case must be decided just as though the presumption had never existed. This rule was clearly stated in *State ex rel. Waters* v. *Hostetter*, 344 Mo. 443, 126 S. W. 2d 1164 (1939), as follows (l. c. 1166):

> "If there be no evidence for the plaintiff except the bare minimum required to support the presumption, then if the presumption be destroyed, that underlying evidence alone will not be enough to raise an *inference* to the same effect and make a *prima facie* case for the jury" (italics the court's).

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[1]Originally enunciated by Professor Thayer, *A Preliminary Treatise on Evidence*, p. 339 (1898). It has been approved by this court in *Del Vecchio* v. *Bowers*, 296 U. S. 280, and appears in the American Law Institute's *Model Code of Evidence*, Rule 704, p. 313.

The appellate courts of Missouri have applied this principle in many cases, and have often sanctioned or ordered the direction of a verdict even though the plaintiff may have made out a *prima facie* case which required evidence to overcome.[2] It is settled that only "substantial evidence," and not some higher degree, is required in order to overcome a procedural presumption. *State ex rel. Steinbruegge* v. *Hostetter*, 342 Mo. 341, 115 S. W. 2d 802, l. c. 804 (1938); *State ex rel. Waters* v. *Hostetter*, 344 Mo. 443, 126 S. W. 2d 1164, l. c. 1165-1166 (1939).

Petitioner places strong reliance on *Wendorff* v. *Missouri State Life Insurance Company*, 318 Mo. 363, 1 S. W. 2d 99 (1927). That case did not involve presumptions at all. The court there considered the general rule that, once a *prima facie* jury case is made out by a plaintiff by means of evidence, the court cannot thereafter direct a verdict for the defendant. However, several exceptions to this broad statement were discussed, and one of these was applied so as to affirm the judgment upon a directed verdict for defendant, based upon an affirmative defense or policy exception.

The same general rule and the exceptions set out in the *Wendorff* opinion were considered by the St. Louis Court of Appeals in *Berne* v. *Prudential Insurance Company of America*, 235 Mo. App. 178, 129 S. W. 2d 92 (1939), that court saying at page 95:

> "The general rule * * * has been held by our Supreme Court to be subject to a further exception *where*

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[2]A representative group of recent cases includes *Duff* v. *St. Louis Mining & Milling Corp.*, 363 Mo. 944, 255 S. W. 2d 792 (1953); *Hendrix* v. *Metropolitan*, (Mo. Sup., 1953) 250 S. W. 2d 518; *Brown* v. *Moore*, (Mo. Sup., 1952) 248 S. W. 2d 553; in addition to the numerous cases cited by the Court of Appeals in its opinion.

plaintiff's prima facie case is based on a presumption. State ex rel. Bowdon v. *Allen*, 337 Mo. 260, 85 S. W. 2d 63" (italics inserted).

The *Berne* case was one in which the holder of an accident insurance policy met his death from a gunshot wound at the hands of another. Plaintiff proved only the violent death. The defendant then introduced the testimony of the person who fired the fatal shot, showing that the insured was shot while attempting to rob a store. The court held that the defendant's evidence destroyed the presumption of accidental death, and that, since plaintiff had no substantial evidence of accident, a verdict should have been directed for defendant. The same result was reached in *Sellars* v. *John Hancock Mutual Life Insurance Co.*, (Mo. App., 1941) 149 S. W. 2d 404, and in *Perringer* v. *Metropolitan Life Insurance Co.*, (Mo. App., 1951) 244 S. W. 2d 607, both accidental death cases in which the presumption was overcome by oral evidence of misconduct. These three cases expressly negate petitioner's claim that her *prima facie* case, made out by means of a presumption, entitled her to a jury submission after the presumption has been destroyed by evidence.

Petitioner cites *Smith* v. *Metropolitan Life Insurance Co.*, (Mo. App., 1937) 107 S. W. 2d 808. If this case be read as holding that a *prima facie* case based on a procedural presumption cannot be taken from the jury even though the presumption is overcome, it is manifestly inconsistent with later decisions of courts of equal standing in the *Berne*, *Sellars* and *Perringer* cases, as well as with the decision of the Supreme Court of Missouri in *State ex rel. Waters* v. *Hostetter*, 344 Mo. 443, 126 S. W. 2d 1164, and with the several decisions of that court cited in footnote two above.[3]

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[3]When there is any conflict in decisions of state courts of coordinate jurisdiction, a federal court in a diversity case will

It is clear, therefore, that the analysis of the Court of Appeals as to the Missouri law of presumptions is correct, and that petitioner's assertions do not correctly state the law.

POINT II.

The Court of Appeals Correctly Held That, Since There Was No Evidence of Accidental Death, Petitioner Did Not Have a Case for the Jury.

The authorities cited on page 5 under Caption "A" of the petition hold that an *innocent* person willfully killed by another suffers an accidental death. They manifestly do not hold that every intentionally caused death is accidental. Under the law of Missouri, one who suffers death as a direct result of his culpable misconduct, does not die accidentally. *Berne* v. *Prudential Insurance Company of America*, 235 Mo. App. 178, 129 S. W. 2d 92 (1939); *Perringer* v. *Metropolitan Life Insurance Co.*, (Mo. App., 1951) 244 S. W. 2d 607. This, indeed, is the general law. See *McCrary* v. *New York Life Ins. Co.*, (8 Cir., 1936) 84 F. 2d 790, a case factually very close to the present one. The statement on page 6 of the petition: "decedent having met death at the hands of another, it is accidental unless defendant sustains its burden of proving misconduct," is therefore not correct legally. And in this connection we may point out that the references to "culpability," "misconduct" or "innocence" do not have any necessary reference to the moral character of the act in question, but may also encompass a situation where an insured has voluntarily placed himself in a position where he may, or should, reasonably anticipate death or serious bodily harm.

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follow the latest decision. *Mutual Benefit Health & Accident Association* v. *Cohen*, (8 Cir.) 194 F. 2d 232, Cert. den. 343 U. S. 965.

As the Court of Appeals points out, the burden of proving accident is always on plaintiff, not on defendant (Opn. 5). A showing of violent death, without more, creates a presumption of accidental death, but such a presumption is not evidence and it disappears completely in the light of evidence, as the authorities cited in our Point I show.

Petitioner is not correct in stating that Respondent relied (solely or principally) on an affirmative defense—that is, confession and avoidance on which the defendant has the burden of proof. The District Judge did not base his decision on the presence of an affirmative defense, but on the very clear proposition that one who dies because of his culpable misconduct does not suffer an accident (S. R. 16). The Court of Appeals announces the same rule, and where the opinion uses the term "affirmative defense" it does so as an analogy, while frankly stating that the term is misleading and that it is speaking of the burden of going forward with evidence, imposed on defendant by the presence of the presumption, rather than of matter which defendant has the burden of proving (Opn. 10). The court then stated that the presumption, when overcome by evidence, disappeared for all purposes and that the only remaining question was whether there was any substantial evidence of accident. This was a correct application of the law of Missouri.

The Court of Appeals thereupon reviewed petitioner's evidence, including that set out in the statement of the petition and under Point "A" in the argument, and held that it did not constitute substantial evidence of accidental death (Opn. 12-13). Based on this finding, the court was obliged to hold, as Missouri Courts often have held, that petitioner was not entitled to go to the jury.

Under our jurisprudence a plaintiff is entitled to trial by jury if the factual hypothesis which he seeks to estab-

lish is supported by evidence, but trial by jury would be purely a capricious thing if a party having the burden of proof were entitled to seek a jury's verdict on the basis of conjecture or speculation which has no support in the evidence. This petitioner had no evidence of accidental death. She therefore was not entitled to a jury submission in a case in which she must prove accident.

There is no merit in petitioner's argument that she was entitled to go to the jury on the question of the credibility of Respondent's witnesses. Conflicting evidence, of course, must be weighed by a jury, but mere disbelief of a witness (or right to disbelieve) will not support an inference that the converse of his testimony is true, unless there is evidentiary support for the opposite position. *Klotsch* v. *P. F. Collier and Son,* 349 Mo. 40, 159 S. W. 2d 589, l. c. 594 (1942); *Eckenrode* v. *Pennsylvania Railroad Company,* (3d Cir.) 164 F. 2d 996. Without evidence to support her claim, petitioner cannot make a case by simply inviting the jury to discredit Respondent's evidence.[4] For this same reason the references in petitioner's statement to Virginia Jackson's emotional condition, and to discrepancies in the testimony on collateral matters do not supply affirmative evidence of accident.

Although petitioner failed to establish her own case by evidence, and therefore Respondent did not need to rely on any affirmative defense, it is well to observe that petitioner is not correct in the assertion that under the law of Missouri the truth of any affirmative defense is always a

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[4]In Petitioner's Conclusion it is suggested that the fact that the witnesses were "the only other actors in the tragedy" is significant. The same situation was present in the *Berne, Sellars,* and *Perringer* cases, cited herein, and the courts there held that the testimony of the "other actors" destroyed the presumption, and authorized direction of a verdict.

question for the jury. In *State ex rel. Bowdon* v. *Allen*, 337 Mo. 260, 85 S. W. 2d 63 (1935), it was held that an affirmative defense could be established as a matter of law by oral testimony. See also *State ex rel. Thompson* v. *Shain*, 349 Mo. 1075, 163 S. W. 2d 967 (1942). In the *Wendorff* case, on which petitioner places such strong reliance, the court held that when the evidence and reasonable inferences therefrom support only one conclusion, nothing is left but a matter of law, and a verdict may be directed. In the present case the *only* evidence as to what actually happened showed that the insured was guilty of culpable misconduct, that he was committing a felonious assault, and that he most certainly should reasonably have anticipated death or bodily harm (thus destroying the "accident" element entirely.)

Counsel for petitioner have injected some confusion into the petition by their apparent though vague references to criminal procedure and law (Petn. pp. 6, 8). We suggest also that: (a) they seemingly fail to recognize the fact that petitioner's so-called *prima facie* case rested upon a *presumption;* (b) that petitioner's "rebuttal" evidence (Petn. p. 4) was actually nothing more than "innuendo" and "inference upon an inference" (Opn. p. 11) "entitled to no evidentiary consideration." The Court of Appeals correctly applied the law of Missouri to the facts shown by this record, so as to uphold the District Court's direction of a verdict for the defendant.

POINT III.

Petitioner Has Shown No Circumstances Justifying Review by This Court.

The petition does not refer to any of the considerations governing review on certiorari as set out in Rule 19 of this court. No such consideration is present. The peti-

tion sets forth as the only "Question Presented," whether a *prima facie* case can be taken from the jury. Our authorities show that under the circumstances here present this can be done.

There is no conflict with the controlling decisions of Missouri Appellate Courts. The opinion of the Court of Appeals is firmly grounded on Missouri authorities, which are cited at length. It is the announced policy of this court to defer to a determination of questions of state law by the Court of Appeals of the circuit which includes the state. *Spiegel's Estate* v. *Commissioner*, 335 U. S. 701, l. c. 708, and cases there cited.

Nor is it the function of this court to scrutinize a record which has already been carefully reviewed by two lower courts, for the purpose of reconsidering those courts' evaluations of the evidence. This, too, is contrary to announced policy. *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440; *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206.

If review were granted for the reasons suggested by petitioner, then this court could not logically refuse to review any diversity case, following a ruling by a Court of Appeals based on local law and determining the sufficiency of the evidence under that law.

CONCLUSION.

The opinion of the Court of Appeals is correct both as to the law and as to its application to the particular facts. Petitioner has shown no ground for review by this court. The petition for certiorari should be denied.

Respectfully submitted,

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